WP(C) 6085/2006
BEFORE
THE HON'BLE MR. JUSTICE B.K.SHARMA

(JUDGMENT AND ORDER)

The challenge in the writ petition is the order dated 16.10.2006 (Annexure-VII to the writ petition) by which the petitioner's dealership of retail petroleum product has been terminated.

2. The Memorandum of Agreement dated 19.11.1997 was entered into by and between the petitioner and the respondent-Corporation in respect of appointment of the petitioner as a dealer for the retail sale of petroleum products in the scheduled premises. The agreement contains the terms and conditions of the dealership. Even prior to the agreement, the father of the petitioner was running the business of selling petroleum product since 1962 from the same premises. After his demise, accepting the verbal request of the petitioner, he was appointed as the dealer by letter dated 25.7.1996 and thereafter, the agreement dated 19.11.1997 was executed by and between the parties.

3. According to the petitioner, in the place in which the dealership of the petitioner is located, there is only one petrol and diesel pump belonging to the petitioner and there is increase of demand for petrol. It has been stated in Paragraph 8 of the writ petition that the Government officials including the Deputy Commissioner and the Superintendent of Police purchase petrol from the petitioner's service station on credit basis due to non-availability of fund with them. Because of such credit system and non-payment of payment in time, the petitioner has to suffer from great financial hardship.

4. It has been stated in the writ petition that the functioning of the outlet remains open for check by the authorities and as per the practice, the officials of the Weights and Measures Department put seal on the outlet to ensure that no foreign substance is added from outside. Besides, the checks are also carried out by the respondent-Corporation through its officials. On 6.5.2006, 13.6.2006, 15.7.2006 and 25.7.2006, the dispensing pump (diesel) was checked by the Inspector of Legal Metrology with 5 litre check measure and delivery was found correct within the limit of tolerance. The petitioner has annexed endorsement of the Inspector in the Inspection Book as Annexure-III to the writ petition.

5. The Respondent No.2 by his Annexure-4 communication dated 28.7.2006 informed the petitioner that there was tampering of weight and measure seal of HSD (High Sprit Diesel) dispensing unit. It was also alleged that free air facility was not available and the M.S. (Motor Spirit) product was found dry on certain days and that HSD product was also found dry on certain days. The letter dated 28.7.2006 was issued to the petitioner on the basis of the purported surprise inspection report submitted by the Executive Sales Officer of the Respondent No.2. The petitioner was asked to furnish his explanation so as to reach the authority on or before 10.8.2006. On receipt of the communication, enclosing therewith the inspection report dated 26.7.2006, the petitioner submitted his explanation on 9.8.2006 denying the allegations made against him.

6. After the aforesaid communication and the explanation furnished by the petitioner, the dealership agreement has been terminated by the impugned order dated 16.10.2006 (Annexure-VII to the writ petition). The dealership has been terminated in reference to clauses 8, 9 and 55 (A)m 55 (I) and 55 (K) of the Dealership Agreement. It has been stated in the impugned order that the explanation furnished by the petitioner was not satisfactory and attributing irregularities, malpractice and violation of various clauses of the Dealership Agreement, it has been cancelled by the impugned order.

7. The respondents have filed their counter-affidavit. In paragraph 8 of the affidavit, the letter dated 28.7.2006 (Annexure-IV) by which the petitioner was asked to furnish explanation, has been described as the show cause notice. In paragraph 10, it has been stated that the termination of dealership is justified as the petitioner has committed major offence like tampering of seal, not providing statutory facilities, tarnishing the image of the Corporation and violation of several clauses of the dealership agreement. It has been indicated that clauses which have been found violated are Clauses 8, 9, 55 (A), 55(I) and 55(K). The petitioner has filed an affidavit-in-reply denying the stand of the respondents in the affidavit-in-opposition. Various facts have been stated regarding the retail outlet and its inspection by the officials of the Legal Metrology Department, even on 25.7.2006, just one day ahead of the purported tampering was detected by the officials of the Respondents No.1, 2 and 3 i.e. on 26.7.2006. According to the petitioner, the agreement could not have been terminated without first complying with the requirement of principles of natural justice and Clause 55 of the contract agreement.

8. Mr. S. Ali, learned counsel arguing for the petitioner has extensively referred to the pleadings, clauses in the agreement and has also placed reliance on the following decisions :-

i) (1991) 1 SCC 212 (Kumari Shrilekha Vidyarthi v. State of U.P.)
ii) AIR 1984 SC 1271 (Liberty Oil Mills v. Union of India)
iii) AIR 1981 SC 1758 (North Bihar Agency v. State of Bihar)
iv) (1998) 8 SCC 01 (Whirlpool Corporation v. Registrar of Trade Marks)
v) (2004) 3 SCC 553 (ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.)
vi) (1990) 3 SCC 752 (Mahabir Auto Stores v. Indian Oil Corporation)
vii) (2006) Supp. GLT 550 (State of Assam v. Bhagya Kalita)
viii) (2003) 2 SCC 107 (Harbanslal Sahnia v. Indian Oil Corporation Ltd.)
ix) AIR 2006 DEL 57 (Ashish Gupta v. I.B.P. Co.)

9. Mr. H. Rahman, learned counsel appearing for the respondents, on the other hand, has questioned the maintainability of the writ petition. According to him, there being alternative remedy, the petitioner cannot invoke the writ jurisdiction. He has placed reliance on the decision of the Apex Court in Whirlpool Corporation v. Registrar of Trade Marks reported in (1998) 8 SCC 01.

10. I have considered the rival submissions made by the learned counsel for the parties as well as the materials on record. In the communication dated 28.7.2006, the allegations made against the petitioner are that the weight and measure seals of H.S.D. Dispensing Unit was found tampered; free air facility was not available, M.S. and HSD product was found dry on certain days. In the explanation furnished by the petitioner, it was indicated that even on 25.7.2005, the day preceding inspection of the retail outlet by the officials of the respondent Corporation i.e. on 26.7.2006, the seal was found intact and accordingly, it was certified to be so. The petitioner also pointed out that even on 19.7.2006, the Corporation’s Maintenance-cum-Technical Operator had repaired the HSD Dispensing Unit and reported that Working found OK . As regards the allegation that the Corporation’s Executive Sales Officer, upon inspection of the retail outlet on 26.7.2006 reported that the seal was found tampered with, it was contended by the petitioner that the seal might get tampered at the time of opening and handling of pump by the operator.

11. As regards the facility of free air, the petitioner explained that the same was always available as will be evident from the surprise inspection report dated 8.5.2006. But on 26.7.2006, the same was not found available as the machine was sent for repairing to the workshop. Finally, regarding the allegation that MS and HSD products were found dry on certain days, it was pointed out due to supply of MS & HSD to the Government departments on credit basis, the same affects regular flow of cash and to control the credit facilities to the Governmen

t departments at times the pump had gone dry pending recovery of credit and main tenance of sufficient stock. In the explanation, it was pointed out that in the inspection report nothing adverse was recorded regarding stock, density and del ivery of HSD.

12. After the explanation furnished by the petitioner, the respondent-Corpor ation has terminated the agreement by the impugned communication dated 16.10.20 06 attributing irregularities/malpractices and violation of various clauses of d ealership agreement. It has been stated in the impugned order that the explanati on furnished by the petitioner was found not satisfactory. No discussion has b een made in the impugned order as to the alleged irregularity/malpractices and t he alleged violation of various clauses of the agreement.

13. In the communication dated 28.7.2006, it was not indicated to be a show cause notice towards termination of the agreement which was executed wayback in 1997. Pointing out the purported irregularities, the petitioner was simply asked to furnish his explanation on or before the target date without any indication that the same might lead to termination of the agreement. It is in this context the learned counsel for the petitioner argued that there has been gross violat ion of the principles of natural justice towards issuance of the impugned order. The impugned order also does not indicate consideration of the explanation fur nished by the petitioner. The retail outlet in existence since 1962 with the ren ewed agreement with the petitioner executed in 1997 has been closed pursuant to termination of the contract by the impugned order dated 28.7.2006. As indicated above, it was never intimated to the petitioner that the communication dated 28 .7.2006 was in the form of a show cause notice towards likely termination of th e agreement in absence of satisfactory explanation. The petitioner was simply asked to place explanation which he accordingly did. Thereafter, without provi ding any opportunity of being heard, the respondent-Corporation terminated the a greement by the impugned order. The petitioner was never put to any kind of not ice towards termination of the contract. The communication dated 28.7.2006 cann ot be said to be kind of notice contemplated towards termination of kind of agr eement involved in this proceeding.

14. In the reply affidavit filed by the petitioner, the copy of the communic ation dated 5.5.1999 issued by the Controller of Legal Metrology to the Vice-P resident of the Federation of All India Petroleum Dealers has been annexed as pe r which the Weight and Measures rules do not provide for checking of delivery o f dispensing units by any other authorities other than the Inspecting Officers o f the Legal Metrology Department. The fact that the retail outlet seal was foun d intact on 25.7.2006 has not been denied by , the respondent-Corporation. Howev er, on the following day i.e. 26.7.2006, upon surprise visit of the officials o f, the respondent-Corporation, the seal was found to be tampered with. The expl anation furnished by the petitioner about which discussions have been made above is plausible one. The same is the case as regards the machine relating to fre e air.

15. On perusal of the inspection report, it is found that except the irreg ularities pointed out in the communication and in the report, other essentials t owards maintenance of the retail outlet were found to be in order. It was never indicated in the communication dated 25.7.2006 that the same was by way of a s how cause notice towards termination of the agreement with the petitioner. The decisions on which the learned counsel for the petitioner has placed reliance is primarily on the point of violation of principles of natural justice. In all th e cases, it has been held that before visiting the party with adverse conseque nce, such as, cancellation of license etc., the party must be put to notice and that pre-decisional hearing in the matter is not hearing in the eye of law. It has been observed by the Apex Court that the fairness in action with due informa tion and taking into consideration the affected party is sine quo non before pa ssing an order adversely affecting the party. In Mahabir Auto Stores (supra) t

he Apex Court observed as follows :-

(19) Such transaction should continue as an administrative decision with the organ of the State. It may be contractual or statutory but in a situation of tra nsaction between the parties for nearly two decades, such procedure should be fo llowed which will be reasonable, fair and just, that is, the process which norma lly be accepted to be followed by an organ of the State and that process must be conscious and all those affected should be taken into confidence.

16. In Whirlpool Corporation (supra), it has been held that alternative reme dy is not a constitutional bar to High Courts, but is a self-imposed restriction s. It has been held that under 3 circumstances, alternative remedy would not ope rate as a bar. They are - 1) where the writ petitioner seeks enforcement of any of the fundamental rights, 2) where there is violation of principles of natural justice and 3) where the order or proceedings are wholly without jurisdiction or vires of Act is challenged. Likewise, in ABL International Ltd. (supra), deal ing with the question of maintainability of the writ petition, it has been held that in an appropriate case, the writ Court has the jurisdiction to entertain th e writ petition involving disputed question of fact and there is no absolute bar in regard thereto. In Harbanslal Sahnia (supra), it has been held that the rul es of exclusion of writ jurisdiction by availability of alternative remedy is of discretion and not one of compulsion. In that case, the petitioner's dealers hip was terminated as in the instant case and the Apex Court observed that the p etitioners should have been allowed relief by the High Court itself instead of d riving them to the need of initiating arbitration proceeding. The Division Benc h of this Court in Bhagya Kalita's case held that even in contractual matter, i f the State acts arbitrarily, the aggrieved party can approach the writ Court. In Ashish Gupta (supra), the Delhi High Court held that the respondents after t erminating the dealership of the petitioner in spite of existence of arbitratio n clause and bypassing the same cannot later on rely upon the same to shut the d oors of the Court.

17. The aforesaid decisions have been relied upon to counter the argument a dvanced by the learned counsel for the respondents that the disputed questions of fact cannot be gone into in writ jurisdiction and that there being alternativ e remedy, the petitioner should first exhaust the said remedy.

18. In the instant case, what is found is that there has been gross violat ion of the principles of natural justice. The petitioner was never apprised of contemplation on the part of the respondent-Corporation that if no satisfactory explanation was furnished, the dealership would be liable to be terminated. The communication dated 28.7.2006 never indicated that the same was a step towar ds taking the impugned decision. Independent of the communication dated 28.7.200 6, the petiioner ought to have been apprised of the contemplation of the respon dent-Corporation to terminate the agreement with the petitioner by furnishing a ppropriate materials. However, the same was not done. After the petitioner fu rnished his explanation as was asked for, the respondent-Corporation terminated the contract agreement without affording any opportunity of being heard to the petitioner. Thus, there being gross violation of principles of natural justice , I am of the considered opinion that the writ petition is maintainable even if there is alternative remedy open to the petitioner. Further, the writ petition having been admitted for hearing without any reservation, the rules of alternat ive remedy may not operate as absolute bar towards deciding the same on merit.

19. In the impugned order, the respondent-Corporation has attributed malpra ctices on the part of the petitioner, but there is no indication as such in the earlier communication dated 28.7.2006. The respondent-Corporation simply asked for the explanation referring to the inspection report and it was never indicat ed that the same was a step towards termination of the agreement. Had there bee n any indication in the communication dated 28.7.2006, the petitioner would hav e been entitled to further opportunity to deal with the allegations. Thus, the

impugned order is not sustainable solely on the ground of violation of principles of natural justice.

20. As per Clause 55 of the contract agreement, the Corporation shall be at liberty to terminate the agreement if the dealer shall commit breach of any of the covenants and stipulations contained in the agreement, and failed to remedy such breach within 4 days of the receipt of the written notice from the Corporation in that regard. In the instant case, not to speak of asking the petitioner to remedy the defects, by issuing notice, within the stipulated period, the petitioner was not even informed that the communication dated 28.7.2006 was in fact in the form of a show cause notice towards termination of the contract agreement. It is only in the affidavit-in-opposition, the respondent-Corporation has described the same as the show cause notice, but on a bare perusal of the same, it cannot be said to be a show cause notice. The alleged irregularities were only pointed out by the said communication asking the petitioner to furnish his explanation which the petitioner did. However, the respondent-Corporation issued the impugned order dated 16.10.2006 without discussing anything about the explanation furnished by the petitioner. It has been alleged in the impugned order that there was violation of agreement clauses as indicated therein. If that be so, as per the requirements of Clause 55, the petitioner ought to have been asked to remedy the breach of the clauses within the stipulated period, but not to speak of providing such opportunity, the petitioner was not even intimated that the letter dated 28.7.2006 was in the form of a show cause notice towards termination of the contract agreement with the petitioner.

21. The petitioner by his reply furnished the required explanation and the explanation so furnished, is a plausible one. The termination of the contract was a serious step. By such termination, the retail outlet in existence since 1962 has been brought to an end. It is true that a fresh agreement was executed by and between the petitioner and the respondent-Corporation but the fresh agreement was also in operation for the last 9 years. Before taking the serious step for terminating the same, the respondent-Corporation ought to have provided the petitioner with reasonable opportunity of being heard. However, not to speak of such opportunity being provided to the petitioner, he was not even put to notice that there was contemplation of the Corporation for termination of the contract agreement. The explanation furnished by the petitioner and categorical statements in the writ petition, have not been so denied by the respondents in their counter affidavit.

22. For all the foregoing reasons and discussions, I am of the considered opinion that the petitioner has been able to make out a case for interference under Article 226 of the Constitution of India in respect of the impugned order dated 16.10.2006. Consequently, the writ petition is allowed by setting aside and quashing the impugned order dated 16.10.2006. The petitioner shall be allowed to run the retail outlet namely, M/S Bani Service Station. However, it is made clear that the petitioner shall fulfill all the requirements for running the retail outlet.

23. Writ petition is allowed, without, however, any order to as to costs.